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In The

Supreme Court of the United States

October Term, 1985

VIVIAN SPRYNCZYNATYK and
PAUL SPRYNCZYNATYK,

Petitioners

vs.

GENERAL MOTORS CORPORATION,

Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

A fourteen year old boy drove a 1980 GM Chevrolet Citation off a steep gravel road in North Dakota. The boy's mother was very badly hurt. She and her husband sued GM on a product liability theory that called for the boy to have hit the brakes. But the boy said and swore three times after the accident that he had not used the brakes at all. So the boy was sent to Texas to be hypotized. The hypnotist disregarded safeguards he endorsed. He knew what counsel was interested in, led the boy to it, and the boy, full of hope, followed. Hypnotized, he said he had hit the brakes as hard as he could.

The District Court, sitting in diversity, purported to follow *State v. Brown*, 337 N.W.2d 138 (N.D. 1983), and admitted the boy's testimony without determining whether it was reliable or whether its probative value outweighed its prejudicial effect. The Court of Appeals reversed on other grounds, not challenged here, remanded, and directed the District Court on remand to make that determination. The question presented is this:

Is a federal court in a diversity action required to admit testimony changed by hypnosis even if it is unreliable or its prejudicial effect outweighs its worth, if any?

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GENERAL MOTORS CORPORATION,

Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

Respondent General Motors Corporation respectfully requests this Court to deny the petition for writ of certiorari seeking review of the Eighth Circuit's opinion in this case reported at 771 F.2d 1112.

STATUTES INVOLVED

Federal Rule of Evidence 403:

Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or

misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

STATEMENT OF THE CASE

A. The Accident

On July 16, 1980, petitioner Vivian Sprynczynatyk and her son Rodney, age 14, were driving on a gravel road in North Dakota. Rodney was at the wheel. He had just gotten his learner's permit a couple of weeks before, and Vivian was teaching him how to drive. (R.T. 116) They went up a hill and started down the other side. (R.T. 96-101, Exs. 1-2) The road, still gravel, was steep, about an 11% grade (R.T. 215, 691, Ex. 28), and rough, like a washboard. (R.T. 120)

Rodney let the car pick up speed. (R.T. 199-200) The car "jerked sharp" to the right. (R.T. 101, 227) Rodney steered it back to the left, but then it jerked right again. (R.T. 103-04, 211) Rodney steered to the left again, crossed the middle of the road and headed for the left ditch. He was into loose gravel. (R.T. 104, 202-03, 227) He steered back right, saw the right "ditch coming closer" (R.T. 205), and panicked. (R.T. 245-46) He took his hands off the wheel, and closed his eyes. (R.T. 206)

The car went into the right ditch and rolled over. Vivian Sprynczynatyk's neck was broken and she is a quadriplegic. (R.T. 109, 1413 et seq.)

The car was a 1980 Chevrolet Citation manufactured by respondent General Motors Corporation ("GM"). Vivian sued GM for her injuries in the United States District Court for the District of North Dakota, alleging negligence and strict liability. Her husband sued for loss of

consortium and lost services. Jurisdiction was based on diversity of citizenship. (C.R. 1-4)

B. Plaintiffs' Theory and the Difficulty With It

Nothing wrong with the car had caused it to jerk right those two times, and there was no explanation about why it had except the road and driver error. (R.T. 499-500, 636-37) Plaintiffs' lawyers' theory was that Rodney hit the brakes after he steered the car back right the third time, that the rear brakes locked, and that that made the car spin off the road. (R.T. 61-65)

The difficulty was that Rodney said and swore three times that he had not hit the brakes. Thus, twelve days after the accident, he gave a sworn statement about it. He said, "I didn't apply the brakes at all." (R.T. 230-31) Two years later Rodney swore at deposition, "I didn't use any brakes at all." (R.T. 222, 225-26)[1]

C. The Solution: Hypnosis in Texas

After the deposition, without notice to the court or GM (C.R. 98), Rodney was sent to Texas to be hypnotized. The hypnotist was Dr. Robert Gordon, a psychologist with a law degree. Hypnosis played a "very limited" role in Dr. Gordon's practice (R.T. 130-34, 152-53), but he had worked on other things with plaintiffs' lawyers many times before. (R.T. 154)

1. *Guidelines for hypnotic refreshment of memory.*

GM's expert was Dr. Martin Orne, president of the International Society of Hypnosis, editor of the International Journal of Clinical and Experimental Hypnosis, and senior author of the Encyclopedia Britannica's article

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[1] Though Rodney speculated that "it could have been possible" that he used the brakes, his "best recollection" remained that he "did not apply them." (R.T. 245-46)

on hypnosis. (C.R. 110, Orne Aff., Exs. A, B, C) His eminence is repeatedly recognized in the case law. *See, e.g., People v. Shirley,* 31 Cal. 3d 18, 63, 181 Cal. Rptr. 243, 270, 641 P.2d 775, 802, *cert. denied,* 459 U.S. 860 (1982).

Dr. Orne has proposed guidelines for the use of hypnosis to enhance memory if hypnotically enhanced testimony is to be admitted at trial at all. (He does not believe it should.) The guidelines have been adopted by the Criminal Investigation Department, Army, Navy, Air Force, Marines, Treasury Department, and the British Home Office. (R.T. 937-39)

The guidelines call for these procedures, among others:

1. The hypnotist "should get a written statement of the facts" he is told about the case before hypnosis, so there is no doubt what he knows about it; a hypnotist who knows what is at issue is apt, by "subtle cuing," unwittingly to suggest responses to the subject in hypnosis. (R.T. 931-32 (Orne))

2. The hypnotist should tape record the pre-hypnosis interview, so there is no doubt what was said during it: for if the hypnotist suggests a response, the subject will "respond that way" in hypnosis. (R.T. 933-34 (Orne); 169 (Gordon))

3. The hypnotist should determine what the subject knows about the case at the pre-hypnosis interview; that is "crucial" (R.T. 934 (Orne)), since hypnosis may not be "indicated" or "safe" except where one has "difficulty in recollection" (R.T. 155 (Gordon)), and is in fact counterproductive if one does recall. (R.T. 914, 919-20, 943 (Orne))

4. The hypnotist should conduct a post-hypnosis interview, and tape-record it; the post-hypnosis interview is necessary to "know what really went on in hypnosis." (R.T. 934 (Orne))

Dr. Gordon "strongly endorsed" the guidelines (R.T. 985), but he did not follow them and did none of those things. (R.T. 135-36, 142-43, 169-76, 179, 238) Therefore we do not know exactly what happened pre- and post-hypnosis, except this: Plaintiffs' attorneys told Dr. Gordon before hypnosis that (a) Rodney had "lost his memory of the accident" or had "little or no memory of it" (not so) (R.T. 135-36, 171 (Gordon)); and (b) "there was a problem with the brakes" (plaintiffs' liability theory). (R.T. 171-72)[2]

The hypnosis session was videotaped (with one gap), so there is a record of what went on there.

2. *The hypnosis session*

Dr. Gordon put a ring on a coffee table, told Rodney to focus on it and be filled by it, and put him into a trance. He told Rodney "the mind can reach back and recollect things that you never thought were possible." He said "we only have to reach back and recall it . . . . I'm going to let you show me how well you can do that now." (Exs. 4-7, the videotape) Plaintiffs' lawyer was watching through a one-way mirror, and Rodney knew that. (R.T. 234)

Dr. Gordon took Rodney through the day and evening of the accident, and up the gravel hill and down it.

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[2] At trial Dr. Gordon could not recall whether they told him that before or during the hypnosis session (R.T. 172), but at deposition he was clear it was before (Gordon depo., Do. No. 182, pp. 134-35). Dr. Gordon was admittedly "not naive." He understood that the alleged brake problem "would go to the essential matter of liability." (*Ibid.*)

He praised Rodney, and told Rodney he and his family were proud of him as they went along. When they started down the hill, Dr. Gordon began asking Rodney where his feet were: Where is your left foot? Where is your right foot? Where are your feet? (Exs. 4-7) Thirty-two times he asked that, and his voice rose as he did. (R.T. 179 (Gordon); R.T. 954 (Orne); Exs. 4-7) But Rodney did not answer that he had hit the brakes until, finally, this happened:

"RODNEY: Uh-huh. And I see that I'm going to go in the [left] ditch and hit the fence . . . .

"DR. GORDON: You see you are going to hit it. *What are you going to do?* Where is your right foot?

"RODNEY: On the brake.

"DR. GORDON: Where is your left foot?

"RODNEY: Over the clutch.

"DR. GORDON: What are you doing with your right foot and *how much pressure are you putting on the brakes?*

"RODNEY: Pushing.

"DR. GORDON: How hard?

"RODNEY: Hard.

"DR. GORDON: *As hard as you can?*

"RODNEY: Uh-huh." ((R.T. 239-40) emphasis added)

Shortly afterward, Dr. Gordon left the room and conferred with plaintiffs' lawyer. He came back, asked a few questions, then said he was "very, very pleased." Then he brought Rodney out of the trance. He told Rodney he would be in a "beautiful place" when he came out of it, where "you love everybody and everybody loves you" and "you feel terrific."

Rodney and Dr. Gordon smiled and shook hands and the session ended. Rodney felt as if a burden had been lifted from his shoulders. (R.T. 236 (Rodney); C.R. 107)

3. *Dangers with hypnosis and problems with this hypnosis session*

Hypnosis as therapy is accepted and widely used; as Dr. Orne explained, it may serve its therapeutic goal regardless of whether what the patient "relives" is fact or fantasy. (R.T. 894-900) But hypnosis meant to refresh or reform one's memory so one can testify to it is something else. There it matters whether what the patient relives—and testifies to—is fact or fantasy. (R.T. 915-16 (Orne); 166 (Gordon))[3]

Dr. Orne explained that hypnosis as truth finder is unreliable, and in particular was unreliable here. Dr. Gordon essentially agreed with him. The dangers are these:

Suggestion. One under hypnosis suspends critical judgment, and wants very much to please the hypnotist. Consequently, he is in a "state very vulnerable to subtle suggestions." (R.T. 887-88, 906-07, 934 (Orne)) When made, they "contaminate" the patient's memory, because they change it. (R.T. 142, 157 (Gordon); 889-90 (Orne))

Dr. Gordon's advice to Rodney that "the mind can reach back and recollect things that you never thought were possible" was a "powerful, explicit" suggestion. Its effect was to encourage invention. (R.T. 911, 949 (Orne); 159-60, 179 (Gordon)) Dr. Gordon's 32 questions about Rodney's feet were also suggestions. Ac-

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[3] As Dr. Orne explained, hypnosis may be a useful investigative tool, "recognizing that each item is merely a lead and nothing else." A lead is not testimony. It can simply be followed, and may turn something up—or prove an "embarrassment." (R.T. 920-21 (Orne))

cording to Dr. Orne, they were the "fatal flaw," for they told Rodney what Dr. Gordon was interested in. (R.T. 953-55 (Orne)) In fact, Rodney did not say he applied the brakes at all until Dr. Gordon put a leading question that told Rodney exactly what Dr. Gordon was interested in: How much pressure did you put on the brakes? (Not, did you apply them?).

Dr. Gordon made his suggestions the more forceful by his intense tone of voice (R.T. 953-55 (Orne)) and made Rodney the more apt to accept them by praising him when he responded well (including seven times after Rodney talked about where his feet were). (R.T. 888 (Orne))

Dr. Orne testified Dr. Gordon's suggestions would "assure a change in memory." (R.T. 954)

Confabulation. One under hypnosis may "confabulate." Confabulation means making up details one does not recall but that seem to fit. One is particularly prone to confabulate in response to suggestions. (R.T. 162-65 (Gordon); 908-10 (Orne))

Neither hynotist nor patient can tell what is confabulation and what is real memory without checking what the patient says against objective data. (R.T. 158, 162-63, 175-76 (Gordon)) Rodney said only three things that could be checked that way. They show he confabulated. He said he watched "The Price Is Right" on TV on the accident day, but it was on before he got up; he said he watched "The Beverly Hillbillies" also, but it was not on at all that day; and he said his sister fed the dogs, but she was out of town. (R.T. 951-53 (Orne); R.T. 234-35, 241 (Rodney))

Hopes. Before hypnosis Rodney had heard about some brake problems in Chevrolet Citations, and "knew"

if the brakes were hit hard the car could spin. (R.T. 237 (Rodney)) He wanted to be hypnotized to find out whether the accident was his fault or the car's, and naturally he hoped very much it was the car's. (R.T. 943-46 (Orne))

Hypnosis plays on hopes and fantasies, and in hypnosis a strong hope "very likely" will become memory. (R.T. 943-46 (Orne))

Altered Memory. Plaintiffs' lawyers told Dr. Gordon that Rodney had no or little recollection of the accident. That was not so. Rodney had given a full statement and then a deposition about the accident before hypnosis, and it was "striking how fairly complete" his memory was. (R.T. 941 (Orne))

Neither subject nor hypnotist can tell whether what the subject says in hypnosis is fact or fantasy, even where he has no memory before hypnosis. (R.T. 144-45, 157-58, 162-63, 175-76 (Gordon); 904, 915-16, 946-48, 956 (Orne)) If one has a clear memory before hypnosis, the "likelihood" that a hypnotic memory replacing it will be more accurate "is so low that you can virtually discount it." (R.T. 956 (Orne))

Altered Witness. One believes that what he "relives" in hypnosis really happened, and with "great conviction." (R.T. 947 (Orne)) Believing he has found truth, he will likely be a most confident witness. (R.T. 176 (Gordon)) Indeed, "very few" researchers would say that "hypnosis does not destroy the ability to cross-examine." (R.T. 977 (Orne))

Rodney's hypnotic memory replaced his pre-hypnosis memory. He went on to testify to his "new memory," an altered witness. (R.T. 956 (Orne); 238 (Rodney))

D. Proceedings in the District Court

GM moved *in limine* to exclude testimony as to Rodney's hypnotically induced memory on the grounds, among others, that hypnosis is not generally accepted or reliable, and that this hypnosis did not meet procedural safeguards and was like tampering with physical evidence. (C.R. 97-100) The district court did not determine whether hypnosis is generally accepted or reliable, or whether this hypnosis complied with any procedural safeguards. It cited *State v. Brown*, 337 N.W. 2d 138 (N.D. 1983), ruled that Rodney's credibility was for the jury, not the court, and denied the motion. (11/28/83 Tr. pp. 94-99)

Plaintiffs called Dr. Gordon as part of their case-in-chief and offered the videotapes of Rodney's hypnosis session in connection with Dr. Gordon's testimony. GM objected to admission of the videotapes because they were hearsay and prejudicial. The court overruled the objection. (R.T. 145-47) GM asked for a cautionary instruction that the tapes not be taken as proof of the truth of the matters Rodney recounted in them. The court did not give the instruction, and instead told the jury "the purpose of viewing the tapes is to permit you to evaluate the opinions that you will subsequently hear." (R.T. 147; R.T. 1304-05; C.R. 194) The jury then watched the videotapes.

Plaintiffs' liability case was, at best, weak. After trial, the district court itself said that had "Rodney not been permitted to offer his hypnotically induced recall, the verdict on liability might well have been different." (App. A32; C.R. 274)

The jury awarded plaintiffs over $5,000,000 in damages. (C.R. 225)

E. The Court of Appeals' Ruling

The Eighth Circuit held that the videotapes of Rodney's hypnosis session were hearsay and that their admission during plaintiffs' case in chief without an adequate instruction was prejudicial error. It therefore reversed and remanded for a new trial. (App. A11; 771 F.2d at 1118) Plaintiffs do not challenge that ruling here.

The Eighth Circuit also went on to rule that the district court erred in admitting Rodney's hypnotically induced testimony without determining its reliability and whether its worth, if any, outweighed its prejudicial effect. The Court adopted a version of Dr. Orne's safeguards and directed the district court, in making that determination, to consider "to what degree the safeguards were followed" and to "take into account . . . the appropriateness of using hypnosis for the kind of memory loss involved, and whether there is any evidence to corroborate the hypnotically induced testimony." (App. A22; 771 F.2d at 1123) Its holding essentially restates the standard of Federal Rule of Evidence 403:

> "[W]e hold that the district court should, before trial, scrutinize the circumstances surrounding the hypnosis session, consider whether the safeguards we have approved were followed *and determine in light of all the circumstances if the proposed hypnotically enhanced testimony is sufficiently reliable and not overly prejudicial to be admitted.*" (App. A22-A23; 771 F.2d at 1123) (emphasis added).

The Eighth Circuit directed the district court to make that determination on remand.

The district court has not made that determination as to reliability because plaintiffs petitioned to bring the case here before it was remanded there. So plaintiffs ask

this Court to rule that hypnotically induced testimony is admissible whether or not it is reliable and whether or not its worth outweighs its prejudicial effect.

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REASONS FOR DENYING THE WRIT

I. THE CASE IS NOT RIPE FOR REVIEW

The Eighth Circuit found the admission of the videotapes of Rodney's hypnosis session during plaintiffs' case-in-chief was prejudicial error, and therefore remanded for retrial. (App. A27; 771 F.2d at 1125.) Plaintiffs do not argue with that ruling here. Instead, they seek review only of the Court of Appeals' additional ruling on the admissibility of Rodney's live testimony.

"[B]ecause the Court of Appeals remanded the case, it is not yet ripe for review by this Court." *Brotherhood of Locomotive Firemen v. Bangor & Aroostook Railroad*, 389 U.S. 327, 328 (1967). *See also Estelle v. Gamble*, 429 U.S. 97, 114-115 ((1976) (Stevens, J., dissenting); *Hamilton Shoe Co. v. Wolf Brothers*, 240 U.S. 251, 257-58 (1916). Indeed, the issue plaintiffs put to this Court will be moot if on remand the district court excludes Rodney's hypnotically induced testimony but plaintiffs prevail, or if the district court admits the testimony but GM prevails. There is no need to decide moot issues, and it is an imposition on this Court to ask it to decide appeals piecemeal.[4]

II. THE DECISION BELOW WAS SOUNDLY BASED ON RELEVANT AUTHORITY

Plaintiffs claim that the Eighth Circuit's decision is wrong on the merits. They rely on old, and bad, law (Subpart A) and distinctions without a difference (Subpart B).

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[4] Even if the admissibility of testimony affected by hypnosis were certain to be an issue after retrial, it would be better decided after the district court has had an opportunity to make findings that bear on its reliability.

A. The Law

1. *The Old Law and the New Law*

In 1968 the Maryland Court of Special Appeals affirmed the admission into evidence of hypnotically induced testimony, the first court in the United States to do so. *Harding v. State*, 5 Md. App. 230, 246 A.2d 302 (1968), *cert. denied*, 395 U.S. 949 (1969). Several jurisdictions followed *Harding*,[5] including, in a fashion, the Ninth Circuit, the first and only federal circuit to follow it. *Kline v. Ford Motor Co.*, 523 F.2d 1067 (9th Cir. 1975); *Wyller v. Fairchild Hiller Corp.*, 503 F.2d 506, 509 (9th Cir. 1974); *but see United States v. Awkard*, 597 F.2d 667, 669 n. 2 (9th Cir. 1979); *United States v. Adams*, 581 F. 2d 193, 198, 199 n. 12 (9th Cir.), *cert. denied*, 439 U.S. 1006 (1978).

Harding and descendants overlooked *Frye v. United States*, 293 Fed. 1013 (D.C. Cir. 1923) and the fifty (now sixty) years of precedent that followed it. *Frye* held that the result of a scientific technique (there a lie detector test) is inadmissible unless the technique has "gained general acceptance in the particular field in which it belongs." 293 Fed. at 1014. *State v. Mack*, 292 N.W. 2d 764, 767-68 (Minn. 1980) held the *Frye* "general acceptance" test applicable to hypnosis. Thereafter case after case followed *Mack*, and the "most recent decisions by other jurisdictions have consistently applied" *Frye*. *Collins v. State*, 52 Md. App. 186, 198, 447 A.2d 1272, 1279 (1982); *State v. Martin*, 101 Wash. 2d 713, 721, 684 P.2d 651, 655 (1984) (the "substantial majority" applies *Frye*); *Commonwealth v. Kater*, 388 Mass. 519, 526-27, 447 N.E.2d 1190, 1196 (1983) (same).

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[5] See cases collected in *People v. Shirley*, 31 Cal. 3d at 36-38, 181 Cal. Rptr. at 253-54, 641 P.2d at 785-86. *Shirley* relates the applicable history in detail.

Mack and its descendents exhaustively reviewed the scientific literature and experts' opinions — most prominently Drs. Orne's and Diamond's — respecting hypnosis. Upon that review, *Mack* and every case after it applying *Frye* found that hypnosis, even if properly conducted, fails *Frye's* test: Hypnosis is not "generally accepted" by the scientific community as a reliable means to restore, refresh, or find memory. To the contrary, the "overwhelming consensus of expert opinion" is that it is not reliable, and there is no "doubt" about that. *People v. Shirley*, 31 Cal. 3d at 23, 40, 66, 181 Cal. Rptr. at 244, 255-56, 272, 641 P.2d at 776, 787, 804. Consequently, every case following *Mack* and applying *Frye* holds hypnotically induced testimony inadmissible. *See State ex rel. Collins v. Superior Court*, 132 Ariz. 180, 196, 644 P.2d 1266, 1282 (1982) (Arizona); *People v. Shirley*, 31 Cal. 3d 18, 66, 181 Cal. Rptr. 243, 273, 641 P.2d 775, 804, *cert. denied*, 459 U.S. 860 (1982) (California); *People v. Quintanar*, 659 P.2d 710, 711 (Colo. Ct. App. 1982) (Colorado); *Peterson v. State*, 448 N.E.2d 673 (Ind. 1983) (Indiana); *State v. Haislip*, 237 Kan. 461, 701 P.2d 909, *cert. denied*, — U.S. —, 106 S. Ct. 575 (1985) (Kansas); *Collins v. State*, 52 Md. App. 186, 205, 447 A.2d 1272, 1283 (1982) (Maryland); *Commonwealth v. Kater*, 388 Mass. 519, 447 N.E.2d 1190 (1983) (Massachusetts); *People v. Gonzalez*, 415 Mich. 615, 626, 329 N.W.2d 743, 748 (1982) (Michigan); *Alsbach v. Bader*, No. 66470 (Mo. Nov. 21, 1985) (available Feb. 1, 1986, on LEXIS, Missouri library, Civil file (Missouri)); *State v. Palmer*, 210 Neb. 206, 218, 313 N.W.2d 648, 655 (1981) (Nebraska); *People v. Hughes*, 59 N.Y.2d 523, 466 N.Y.S.2d 255, 265-66, 453 N.E.2d 484, 495 (1983) (New York); and *Commonwealth v. Nazarovitch*, 496 Pa. 97, 110, 436 A.2d 170, 177 (1981) (Pennsylvania).

As for *Harding* and descendents, that is "moribund precedent." For in 1982 the same Maryland court that decided *Harding* in the first place repudiated it, held that *Mack* and *Frye* govern instead, and so dealt the *Harding* line its "coup de grace." *See People v. Shirley*, 31 Cal. 3d at 48, 181 Cal. Rptr. at 261, 641 P.2d at 792; *Collins v. State*, 52 Md. App. at 195-96, 447 A.2d at 1278.

Hypnosis as memory restorer is not generally accepted for the same reasons Dr. Orne — and often Dr. Gordon — advised the district court it was not: (1) The hypnotic subject is "highly susceptible to suggestion," even "that which is subtle and unintended," and his "critical judgment" is impaired. (2) The subject "has a compelling desire to please the hypnotist by reacting positively to these suggestions . . . ." (3) Neither subject nor hypnotist nor anyone else can tell whether a memory generated during hypnosis is fact, fantasy, or "confabulation." (4) The subject becomes utterly "convinced of the absolute truth of the account he made while under hypnosis," and it is "impossible to cross-examine such a witness in a meaningful way." *E.g., People v. Shirley*, 31 Cal. 3d at 43-44, 65-66, 181 Cal. Rptr. at 258, 272, 641 P.2d at 789-90, 803-04; *Collins v. State*, 52 Md. App. at 199-201, 447 A.2d at 1280; *State v. Mack*, 292 N.W.2d at 768-69; pp. 7-9, above.

2. *The Valdez-Hurd-Eighth Circuit Rule*

Other courts have found the same shortcomings with hypnotically induced testimony that *Mack* did, but have not gone so far. They strike a middle ground between *Mack* and *Harding* and hold that the testimony might be admitted if, among other things, the hypnosis session follows the procedural safeguards proposed by Dr. Orne to the district court. *United States v. Valdez*, 722 F.2d 1196

(5th Cir. 1984) (applying Federal Rule 403); *State v. Hurd*, 86 N.J. 525, 432 A.2d 86 (1981).

The Eighth Circuit essentially followed *Valdez* and *Hurd*.

B. Plaintiffs' Distinctions With No Difference

Plaintiffs attack the Eighth Circuit's decision by distinctions with no difference. First they say the Eighth Circuit's decision improperly relied on criminal cases. But whether the cases are civil or criminal is beside the point. The reason for the *Mack* and *Valdez-Hurd*[6] rules is that hypnotically induced testimony is unreliable, and "[u]nreliable evidence is unreliable evidence in any forum." *de Vries v. St. Paul Fire & Marine Insurance Co.*, 716 F.2d 939, 945 (1st Cir. 1983) (quoting *Memphis Bank and Trust Co. v. Tennessee Farmers Mutual Insurance Co.*, 619 S.W. 2d 395, 496 (Tenn. Ct. App. 1981)). *Lemieux v. Superior Court*, 132 Ariz. 214, 215, 644 P.2d 1300, 1301 (1982):

> "The concerns that this court expressed in determining that posthypnotic testimony is unreliable in criminal trials are equally applicable in civil litigation."

Second, plaintiffs claim that "[m]any of the cases cited in the [Eighth Circuit's] opinion base their holding on a specific constitutional requirement" and "a constitutional or procedural right peculiar to the criminal defendant." (Pet. 18) That is also wrong. The Eighth Circuit's opinion cites seventeen cases. Ten do not mention constitutional rights of a criminal defendant as a basis for their

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[6] Plaintiffs say "*Hurd* itself realized that different standards were appropriate in the civil area and specified what those standards should be." (Pet. 19) That is wrong. *Hurd* expressly refrained from deciding "whether all of the procedural requirements [it set forth] would be necessary" in a civil case, though expressing the belief that "[a]s a minimum . . . a recording of the session is essential." 432 A.2d at 97 n. 6.

holdings.[7] The other seven that do found the unreliability of hypnosis an independent basis for their holdings as a matter of evidence law.[8] Indeed, several apply their holdings to hypnotically induced testimony offered by the defense as well as by the prosecution,[9] and therefore obviously do not depend on a criminal defendant's constitutional rights.

Third, plaintiffs speculate that "[i]t is entirely possible, if not in fact likely, that most of the criminal cases upon which the opinion relies are applying the beyond a reasonable doubt standard of proof to the preliminary

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[7] *People v. Shirley*, 31 Cal. 3d 18, 181 Cal. Rptr. 243, 641 P.2d 775, *cert. denied*, 459 U.S. 860 (1982); *People v. Quintanar*, 659 P.2d 710 (Colo. Ct. App. 1982); *Bundy v. State*, 471 So. 2d 9 (Fla. 1985); *State v. Iwakiri*, 106 Idaho 618, 682 P.2d 571 (1984); *People v. Smrekar*, 68 Ill. App. 3d 379, 24 Ill. Dec. 707, 385 N.E.2d 848 (1979); *Collins v. State*, 52 Md. App. 186, 447 A.2d 1272 (1982); *People v. Gonzalez*, 415 Mich. 615, 329 N.W.2d 743 (1982); *State v. Mack*, 292 N.W.2d 764 (Minn. 1980); *State v. Palmer*, 210 Neb. 206, 313 N.W.2d 648 (1981); *Commonwealth v. Nazarovitch*, 496 Pa. 97, 436 A.2d 170 (1981).

[8] *United States v. Valdez*, 722 F.2d 1196, 1201 (5th Cir. 1984); *State ex rel. Collins v. Superior Court*, 132 Ariz. 180, 183, 644 P.2d 1266, 1269 (1982); *State v. Hurd*, 86 N.J. 525, 546-47, 432 A.2d 86, 97 (1981); *State v. Beachum*, 97 N.M. 682, 691, 643 P.2d 246, 255 (1981); *People v. Hughes*, 59 N.Y.2d 523, 466 N.Y.S.2d 255, 264-65, 453 N.E.2d 484, 494 (1983); *State v. Peoples*, 311 N.C. 515, 531-32, 319 S.E.2d 177, 187 (1984); *State v. Armstrong*, 110 Wis. 2d 555, 574-76, 329 N.W.2d 386, 396, *cert. denied*, 461 U.S. 946 (1983). Four of these cases (*Valdez, Hughes, Beachum, and Armstrong*) relied only on due process as the alternative ground. Civil defendants are, of course, also entitled to due process.

[9] *People v. Shirley*, 31 Cal. 3d 18, 67, 181 Cal. Rptr. 243, 273, 641 P.2d 775, 805, *cert. denied*, 459 U.S. 860 (1982) (excepting criminal defendant from general prohibition because of right to testify in his own behalf); *Collins v. State*, 52 Md. App. 186, 202-03, 447 A.2d 1272, 1281-82 (1981); *State v. Mack*, 292 N.W.2d 764, 771 (Minn. 1980); *State v. Beachum*, 97 N.M. 682, 690, 643 P.2d 246, 254 (1981). Other cases not referred to in the Eighth Circuit's opinion have done the same. *E.g., People v. Hansleben*, 86 Mich. App. 718, 273 N.W.2d 539 (1978).

question of whether the hypnotically-aided testimony is credible or competent." (Pet. 20). Nothing suggests that any of those cases was influenced at all by the reasonable doubt standard. Moreover, the burden of proof for preliminary facts is not generally more stringent in criminal than civil cases. The preponderance of the evidence test applies to preliminary fact questions in either case. *E.g.*, *Nix v. Williams*, — U.S. —, 104 S.Ct. 2501, 2509 n. 5 (1984); *United States v. Matlock*, 415 U.S. 164, 177 n. 14 (1974); *Lego v. Twomey*, 404 U.S. 477, 488 (1972).[10]

Last, plaintiffs complain that the Eighth Circuit's decision enacts "a two-witness, or corroboration rule in civil cases where hypnosis is an issue." (Pet. 23-24). Plaintiffs say that corroboration is solely a criminal law requirement. That is false. Corroboration may be required by reason of (1) the charge or issue (not all of which are criminal) or (2) the kind of witness, irrespective of the issue. 7 Wigmore, *Evidence* § 2035, at 348 (Chadbourn rev. 1978). There is certainly good reason to require corroboration of a witness' hypnotically induced testimony; no one can tell whether the testimony is true memory or confabulation without checking it against other evidence. Indeed, even the North Dakota decision on which plaintiffs rely affirmed admission of the testimony in part because it was corroborated. *State v. Brown*, 337 N.W.2d at 153.

In any case, the Eighth Circuit did not lay down an ironclad corroboration requirement. It said that corrobora-

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[10] Plaintiffs' quotation from Saltzburg, *Standards of Proof and Preliminary Questions of Fact*, 27 Stan. L. Rev. 271, 305 (1975) is out of context, and that article does not support their distinction. It notes that the standard is the same in civil and criminal cases. It argues for a different standard only respecting confessions, dying declarations, and declarations against interest. That, obviously, has nothing to do with this case.

tion is a "factor" the district court "should take into account" in determining reliability and applying the Rule 403 balancing test. (App. A22; 771 F.2d at 1123) Do plaintiffs really contend that corroboration is not relevant to reliability?

C. Conclusion

The Eighth Circuit's decision was soundly based on relevant authority. Indeed, this is not just an antiseptic case. This is an egregious case. One must see it for what it was.

Rodney's deposition testimony did not fit plaintiffs' liability theory, so Rodney was sent to Texas to be hypnotized. The lawyer-hypnotist did business with plaintiffs' counsel. The hypnotist endorsed Dr. Orne's safeguards, but did not follow them. Rodney had a good memory of the accident, but the hypnotist was told he did not. The hypnotist was told there was (supposedly) "a problem with the brakes," so he knew what plaintiffs' counsel was interested in. The hypnotist's questions to Rodney (32 in ten minutes about feet and brakes) "undoubtedly" suggested to Rodney what he was interested in, and led him to it. Rodney was a teenage boy, and his mother had been badly hurt while he was driving their car. Before hypnosis he had heard there might have been some problem with the car's brakes. He hoped very much the accident was the car's fault, not his, so he followed where he was led, and no surprise; hypnosis plays on hopes.

To say the least, all those things made Rodney's hypnotically induced testimony "even less trustworthy" than it usually is. And add this: Rodney had a good memory of the accident, "striking" how complete, before hypnosis. There was no occasion to hypnotize him in the first place,

and no good end to be served by it. For where one has a good memory before hypnosis, the likelihood that a hypnotic memory replacing it will be more accurate "is so low you can virtually discount it."

Even the "moribund" *Harding* line only permits one who has lost memory before hypnosis to testify to a "refreshed" memory after hypnosis. *See, e.g., Harding v. State,* 5 Md. App. at 236, 246 A.2d at 306 ("lost memory"). We have found no case anywhere that permits one who has a good memory before hypnosis to testify to a changed memory afterward, and plaintiffs cite none. This should not be the first. Changing good memory by hypnosis offends the process of the court and compromises its integrity, particularly where the changed good memory was sworn to at deposition. And offends to no good end.

Certainly a federal court, whether sitting in diversity or not, is not precluded from dealing with that offense.

III. THERE IS NO CONFLICT AMONG THE CIRCUITS TO BE RESOLVED

Plaintiffs argue that certiorari should be granted because the Eighth Circuit's decision conflicts with decisions of the Ninth Circuit on two grounds: (1) The Ninth Circuit applies state law to determine the admissibility of hypnotically induced testimony. (2) The Ninth Circuit admits hypnotically induced testimony without requiring any safeguards. (See Pet. 16-17). Neither proposition is correct.

A. Both the Eighth and Ninth Circuits Apply Federal Law in Determining the Admissibility of Testimony Affected by Hypnosis in Diversity Cases

Plaintiffs point to *Wyller v. Fairchild Hiller Corp.*, 503 F.2d 506 (9th Cir. 1974) and *Kline v. Ford Motor Co.*,

523 F.2d 1067 (9th Cir. 1975). Both cases predate the Federal Rules of Evidence, and neither states whether it applied state or federal law. Since then the Ninth Circuit has made it clear that the Rules govern the admissibility of evidence in diversity cases. *Gibbs v. State Farm Mutual Insurance Co.*, 544 F.2d 423, 428 n.2 (9th Cir. 1976). Moreover, *Wyller* and *Kline* also apparently applied a federal rule.

Wyller was an Alaska case but does not cite Alaska law. It cites two cases from other states, *Harding v. State*, 5 Md. App. 230, 246 A.2d 302 (1968), *cert. denied*, 395 U.S. 949 (1969), and *State v. Jorgenson*, 8 Or. App. 1, 492 P.2d 312 (1971), neither of which is now good law.[11] *Kline* was a California case. It relies on *Wyller*, a federal case, not California law; and it ignores a California case critical of hypnosis. *People v. Ebanks*, 117 Cal. 652, 665, 49 P. 1049, 1053 (1897).[12]

The most recent Ninth Circuit case is *United States v. Awkard*, 597 F.2d 667 (9th Cir. 1979). It referred to *Wyller*, *Kline*, and *United States v. Adams*, 581 F.2d 193 (9th Cir.), *cert. denied*, 439 U.S. 1006 (1978) as resolving the admissibility issue "in this circuit." 597 F.2d at 669. That is a reference to a federal rule, invariant from state to state within the circuit.

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[11] The same court that decided *Harding* repudiated it in *Collins v. State*, 52 Md. App. 186, 447 A.2d 1272 (1982). *Jorgenson* was overruled by statute. Or. Rev. Stat. § 136.675 (1981).

[12] California now prohibits the admission of hypnotically induced testimony. *People v. Shirley*, 31 Cal. 3d 18, 181 Cal. Rptr. 243, 641 P.2d 775, *cert. denied*, 459 U.S. 860 (1982).

B. Both the Eighth and Ninth Circuits Require Safeguards in Connection with Testimony Affected by Hypnosis

Plaintiffs also claim that the Ninth Circuit rule is "directly opposed to the opinion of the Eighth Circuit herein." (Pet., 17). That is not so.

The Eighth Circuit rule requires the trial judge to determine reliability, taking into account whether appropriate safeguards have been followed in the hypnosis session. (App. A22-A23; 771 F.2d at 1122-23) The Ninth Circuit's approach is essentially the same. *See, e.g., Awkard*, 597 F.2d at 669 n. 2:

> "We have suggested procedures to be followed during hypnosis to ensure that post-hypnosis statements are truly the subject's own recollections. . . . Objections to the subject testimony on the ground that such procedures were not followed should be heard by the district judge before trial, or out of the presence of the jury on voir dire of the witness."

Accord, Adams, 581 F.2d at 198-99:

> "Great care must be exercised to insure that statements after hypnosis are the product of the subject's own recollections, rather than of recall tainted by suggestions received while under hypnosis."

Both circuits require the trial judge to determine the reliability of hypnotically induced testimony, taking into account the procedures followed in the hypnosis session. Thus, the circuits do not have "contrary positions," and there is no conflict between them.

IV. NEITHER RULE 601 NOR THE ERIE DOCTRINE REQUIRED APPLICATION OF NORTH DAKOTA LAW TO ADMIT RODNEY'S TESTIMONY

Plaintiffs contend that Rodney's testimony was admissible under North Dakota law and that Federal Rule of

Evidence 601 and possibly *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938), required this diversity court to apply North Dakota law here. Plaintiffs are wrong on all counts.

A. North Dakota Law

Plaintiffs rely on *State v. Brown*, 337 N.W.2d 138 (N.D. 1983). Their reliance is misplaced. *Brown* held hypnotically induced testimony admissible where, among other things, (1) "a valid investigatory purpose existed" for the hypnosis because the witness lacked significant recall; (2) there were no "impermissible suggestions" in the hypnosis session; and (3) the hypnotically induced testimony was "corroborated by other evidence." 337 N.W. 2d at 152-53.

The opposite of those facts exists here. (1) Rodney had good, not lost, recall. (2) There were impermissible suggestions from beginning to end of this hypnosis session. (3) Rodney's testimony was not corroborated by anything.

Brown did not approve hypnosis that changes testimony sworn to by a witness whose memory is good, much less where the change is the work product of a session like this one. Therefore no Rule 601 or *Erie* issue arises to begin with—but neither applies anyway.

B. Rule 601

Rule 601 provides that "in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the competency of a witness shall be determined in accordance with state law." Plaintiffs contend that whether Rodney's testimony was admissible was a competency question, so Rule 601 and therefore North Dakota law applies (assuming the testimony would be admissible under it).

Plaintiffs' argument turns on the contention that "the Eighth Circuit is . . . bound by North Dakota's determination that the issue . . . does concern whether or not Rodney Sprynczynatyk was a competent witness." (Pet. 14) The idea is that in a diversity case "competency" in Federal Rule 601 means what the state says it means.

That is preposterous on its face. States do not determine what federal rules mean. And plaintiffs admit that no case supports their view. (Pet. 14) They rely entirely on a passage from 21 C. Wright & K. Graham, *Federal Practice & Procedure:* Evidence § 5056, at 278 (1977). But that passage concerns Rule 104, which relates to determination of preliminary facts by the court, not Rule 601. The passage simply says that there is an argument that the "state method of determining" competency or privilege should be followed. "State method of determining" does not mean how a state construes "competency," but what procedures a state court uses in adjudicating preliminary facts.

Wright and Graham elsewhere make it plain that state law ought not determine what "competency" means. Thus they opine that state law should not control what constitutes a "presumption" or "privilege" within the meaning of Rules 302 and 501, because the state characterization is likely to be "haphazard" or "off-hand" and not responsive to Congress' purpose. 21 Wright & Graham, *supra*, § 5136, at 668 (1977); 23 *Id.* § 5423, at 701 (1980). The same reasoning applies to Rule 601.

The Eighth Circuit did "not view this issue as a competency question but as an evidentiary problem within the control of the district court and governed by federal law." (App. A20; 771 F.2d at 1122.) That is correct. In Rule 601,

"competency" refers to basic qualifications to be a witness. ("Every person is competent to be a witness except as otherwise provided in these rules.") The question here was not whether Rodney possessed the basic qualifications to be a witness. *United States v. Valdez*, 722 F.2d 1196, 1204 (5th Cir. 1984); *People v. Shirley*, 31 Cal. 3d at 67, 181 Cal. Rptr. at 273, 641 P.2d at 805. It was rather what this competent witness could testify about. He could testify to his prehypnosis recollection. He could not testify, for example, to hearsay or some opinions. (Rules 701, 802) And he could not testify to what he was induced to say in that hypnosis session if the testimony's prejudicial effect outweighed its worth. (Rule 403) Rule 601 does not change Rules 701, 802 or 403. (As to Rule 403, see next paragraph.)

C. Erie

Even assuming a witness is competent under applicable state law in a diversity case, the trial judge retains power to exclude his testimony under Rule 403. *E.g.*, 10 J. Moore & H. Bendix, *Moore's Federal Practice* § 601.04, VI-19 (2d Ed. 1985); *see also id.*, at VI-27; 3 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 601[01], at 601-9 (1985). Plaintiffs appear to argue, however, that *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938) undoes the Federal Rules. There is nothing to that amazing thesis.

1. *The Federal Rules are valid under Erie*

Hanna v. Plumer, 380 U.S. 460 (1965), holds that notwithstanding *Erie*, the Federal Rules of Civil Procedure apply in a diversity action unless a given rule exceeds the mandate of the Rules Enabling Act (28 U.S.C. § 2072) or the Constitution. *Id.* at 471. Congress enacted the Federal Rules of Evidence, Pub. L. No. 93-595, 88 Stat. 1926 (1975), so they "stand on even firmer ground than that of the

Rules of Civil Procedure," 19 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure:* Jurisdiction § 4512, at 192 (1982), and are presumptively valid under *Erie. Hanna*, 380 U.S. at 471. Congress obviously did not exceed its constitutional power to regulate the federal courts in enacting the Federal Rules of Evidence for federal courts. Rather, "since all of the Evidence Rules can rationally be viewed as rules of procedure (the constitutional standard announced in *Hanna v. Plumer*), they all clearly are constitutional." 19 Wright, Miller & Cooper, *supra*, at 193 (footnote omitted). Therefore the Rules themselves, the Rules of Decision Act (28 U.S.C. § 1652 (1976)), and the Constitution's supremacy clause mandate that they apply in diversity actions. *In re Air Crash Disaster Near Chicago, Illinois on May 25, 1979*, 701 F.2d 1189, 1193 (7th Cir.), *cert denied*, 464 U.S. 866 (1983).

That is settled law. *E.g., McInnis v. A.M.F., Inc.*, 765 F.2d 240, 244-245 (1st Cir. 1985); *Warner v. Transamerica Insurance Co.*, 739 F.2d 1347, 1351 n. 6 (8th Cir. 1984); *In re Air Crash Disaster*, 701 F.2d at 1193 (7th Cir. 1983); *Joy Manufacturing Co. v. Sola Basic Industries*, 697 F.2d 104, 110 (3d Cir. 1982); *Ballou v. Henri Studios, Inc.*, 656 F.2d 1147, 1153 (5th Cir. 1981); *Gibbs v. State Farm Mutual Insurance Co.*, 544 F.2d 423, 429 n.2 (9th Cir. 1976); *United Telecommunications v. American Television and Communications Corp.*, 536 F.2d 1310, 1316 (10th Cir. 1976); *Rhodes v. Michelin Tire Corp.*, 542 F. Supp. 60, 61 (E.D. Ky. 1982); *Campus Sweater & Sportswear v. M.B. Kahn Construction Co.*, 515 F. Supp. 64, 98 (D.S.C. 1979), *aff'd*, 644 F.2d 877 (4th Cir. 1981); *In re "Agent Orange" Product Liability Litigation*, 580 F. Supp. 690, 695 (E.D.N.Y. 1984).

2. *No case plaintiffs cite requires application of state law.*

Plaintiffs point to several diversity cases that (they say) have followed state evidence law. (Pet. 8-9) None helps them.

Most looked to state law to determine the materiality of evidence. Materiality is a substantive, not evidence, law question, governed by the states under *Erie*. 19 C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure: Jurisdiction* § 4512, at 194 (1982). Thus, *Rexrode v. American Laundry Press Co.*, 674 F.2d 826 (10th Cir.), *cert. denied*, 459 U.S. 862 (1982), held industry safety standards inadmissible in a strict liability design defect case because "irrelevant" to provide a defense under a state substantive law. 674 F.2d at 831.[13] *Raney v. Honeywell, Inc.*, 540 F.2d 932 (8th Cir. 1976) and *Morrow v. Greyhound Lines, Inc.*, 541 F.2d 713 (8th Cir. 1976) likewise determined the materiality of expert testimony about inflation in connection with damages under state substantive law. And *Greiner v. Volkswagenwerk A.G.*, 540 F.2d 85 (3d Cir. 1976) held evidence of drinking without proof of intoxication inadmissible in a negligence action because immaterial under Pennsylvania law. *Fisher v. Dye*, 386 Pa. 141, 148, 125 A.2d 472, 476 (1956); *Morreale v. Prince*, 436 Pa. 51, 53, 258 A.2d 508, 509 (1969) (such evidence "has no role to play in any case"). But even if *Greiner* did apply Pennsylvania evidence law, it was tried before the Federal Rules of Evi-

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[13] *Rexrode* referred to *Fabian v. E. W. Bliss Co.*, 582 F.2d 1257, 1260-61 (10th Cir. 1978) as "adopt[ing] the position that State evidentiary law would be applied in determining the admissibility of industry safety standards in diversity strict liability cases," 674 F.2d at 831 n.17, but that was clearly just loose usage. *Fabian* did not concern the admissibility of evidence at all, much less what law controlled it, but a jury instruction.

dence were effective, 540 F.2d at 88, and decided under former Fed. R. Civ. P. 43(a), 540 F.2d at 90, which the Federal Rules of Evidence superseded.

Plaintiffs' other cases are beside the point. *Kirshner v. Broadhead*, 671 F.2d 1034 (7th Cir. 1982), said that testimony was inadmissible "under the standards laid down in either the Indiana case or the federal decisions." 671 F.2d at 1040. *Potter v. St. Louis-San Francisco Railway*, 622 F.2d 979, 983 (8th Cir. 1980) refused to apply a state case to exclude contested evidence. And *Olson v. Green*, 668 F.2d 421 (8th Cir.), *cert denied*, 456 U.S. 1009 (1982); *Jones v. Wyrick*, 415 F. Supp. 108 (E.D. Mo.), *aff'd*, 542 F.2d 1013 (8th Cir. 1976); and *Shaw v. Gathwright*, 487 F. Supp. 459 (E.D. Va. 1980) were *habeas corpus* proceedings reviewing state criminal trials, not diversity cases.

There is nothing to plaintiffs' *Erie* claim.

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CONCLUSION

The petition should be denied.

Respectfully submitted,

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